ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF KANSAS.[2]

SUPREME COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW YORK.[4]

ACTION.

Joinder of different Causes growing out of same Transaction.—A cause of action for false imprisonment may be joined with a cause of action for slander, when both arise out of the same transaction: *Harris* v. *Avery*, 5 Kan.

In such a case, where the petition alleges that both causes of action arose out of the same transaction, and when the other facts stated in the petition are not inconsistent with such allegation, *Held*, that a demurrer to the petition on the grounds "that it appears on the face of the petition that several causes of action are improperly joined," should be overruled: *Id.*

ADMIRALTY.

Pilot Laws—Collision.—A state pilot law having provided for the educating and licensing of a body of pilots, enacted that all masters of foreign vessels bound to or from one of the state ports "*shall* take a licensed pilot, or, in case of refusal to take such pilot, *shall* pay pilotage as if one had been employed." It enacted further, that any person not licensed as a pilot, who should attempt to pilot a vessel as aforesaid, should be "deemed guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding $100, or imprisonment not exceeding sixty days," and that all persons employing any one to act as a pilot not holding a license, should "forfeit and pay the sum of $100." The pilot first offering his services to a vessel inward bound had a right to pilot her in, and when she went out the right to pilot her out. *Held*, that under this statute vessels were compelled to take a pilot: *The China*, 7 Wall.

But held, further (the statute containing no clause exempting the vessel or owners from liability for the pilot's mismanagement), that the responsibility of the vessel for torts committed by it not being derived from the law of master and servant, or from the common law at all, but from maritime law, which impressed a maritime lien upon the vessel in whosesoever hands it might be for torts committed by it, the fact that the statute thus compelled the master to take the pilot did not exonerate the vessel from liability to respond for torts done by it, as, *ex. gr.*, for a collision, though the result wholly of the pilot's negligence: *Id.*

Collision.—Although the rules of navigation require that a vessel

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[1] From J. W. Wallace, Esq., Reporter, to appear in 7 Wall. Reports.

[2] From Hon. C. K. Gilchrist, to appear in 5 Kansas Reports.

[3] From the Judges, to appear in 48 N. H. Reports.

[4] From Hon. O. L. Barbour, Reporter; to appear in vol. 52 of his Reports.

coming up behind another, and on the same course with her, shall keep out of the way, yet the rule presupposes that the other vessel keeps her course, and it is not to be applied irrespective of the circumstances which may render a departure from it necessary to avoid immediate danger: *The Grace Girdle*, 7 Wall.

Where, in case of collision with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen: *Id.*

This court will not readily reverse in a case of collision depending on a mere difference of opinion as to the weight and effect of conflicting testimony, where both the District and Circuit Courts have agreed. It affirmed accordingly a decree in such a case: *Id.*

AGREEMENT.

In Fraud of Creditors; Account of Transactions under.—An action will not lie to compel the defendant to render an account of his receipts and expenditures, and of his transactions, and to convey to the plaintiff real estate which he holds under a trust agreement entered into for the benefit of the plaintiff, where it appears that the object of such agreement was to prevent a creditor of the plaintiff from enforcing and collecting a judgment and demands held against him, and that it was designed to hinder and delay such creditor in the collection of judgments: *Sweet* v. *Tinslar*, 52 Barb.

An agreement of that nature is fraudulent in point of fact and in law; and as fraud vitiates all contracts, the court will not lend itself to aid either party in its enforcement. Nor will it assist one of them, by directing an accounting and a conveyance of real estate by the other: *Id.*

Setting aside in Equity.—The doctrine is well settled that a court of equity will not set aside an agreement intended to defraud third parties, as between the parties themselves: *Id.*

CHECKS.

Time of Presentment.—It is well settled that presentment of a check or draft on a bank, the day after it is drawn, is in season. Checks and drafts are subject to the same rule in this respect: *Kelty et al.* v. *The Second National Bank of Erie*, 52 Barb.

Where the facts are not disputed, whether due diligence has been used is a question of law for the court: *Id.*

What is a Payment of.—Where, on presentment of a check or draft, the holder receives from the drawee a check for the amount, such check is not a payment, if not paid; and hence the draft does not cease to be a valid obligation. The subsequent return of the check and receipt of the draft, and protest of the latter, in due season, will preserve its vitality, and the holder may recover the amount from the drawers: *Id.*

CIRCUIT COURT

Jurisdiction and Practice.—The Act of February 28th 1839, § 8, 5 Stat. at Large 322, providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most conve-

nient Circuit Court in the next adjacent state, is not repealed by the Act of March 3d 1863, 12 Stat. at Large 768, providing that under certain circumstances named in *it*, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time: *Supervisors* v. *Rogers*, 7 Wall.

A court of the United States has power to adopt in a particular case a rule of practice under a state statute; and where a Circuit Court is possessed of a case from another circuit, under the above-mentioned Act of 1839, it may adopt the practice of the state in which the Circuit Court is held from which the case is transferred, as fully as could the Circuit Court which had possession of the case originally: *Id.*

Corporation.

Dissolution.—The insolvency of a corporation, or the fact that it has assigned all its property and effects to an assignee for the benefit of its creditors, does not extinguish its legal existence. Neither does the failure to elect officers or to hold meetings for many years dissolve the corporation: *Parsons* v. *Eureka Powder Works*, 48 N. H.

Damages.

When Exemplary Damages may be given.—Exemplary damages are only to be given in case of fraud, malice, gross negligence, or oppression: *Cram* v. *Hadley*, 48 N. H.

The court erroneously instructed the jury, with the assent of counsel for defendant, that they might give exemplary damages in the case if they saw fit, when there was no evidence that warranted such instructions. After verdict for plaintiff and a motion by defendant to set the same aside as against the law and the evidence, *Held*, that if it did not appear affirmatively from the verdict or the evidence reported, whether any exemplary damages were given, or, if any, how much, the verdict would not, under these circumstances, be set aside: while, if defendant's counsel had seasonably objected to the instructions given and requested the proper instructions, the entire verdict, under similar circumstances, would be set aside: *Id.*

But when it appears affirmatively, either by the verdict or the evidence reported, that exemplary damages were given, and to what amount, the court will, even under the circumstances of this case, correct the error in the verdict by ordering a *remittitur* for such exemplary damages and allowing the plaintiff to take judgment for the residue: *Id.*

Where a trade was negotiated between the plaintiff and defendant by a third person, one B., and the question is, "What was the understanding of the two parties in relation to the trade?" after the terms of the offer or proposition which the defendant made to B. are shown by competent evidence, then it may be shown, either by B. or *by the plaintiff*, that the same offer or proposition was communicated by B. to the plaintiff and accepted by him: *Id.*

Deed.

Description of Encumbrance.—A deed conveying premises "subject to a certain mortgage executed by the parties of the first part on said

premises, in the year 1856, of $1000," sufficiently describes the mortgage; as an examination of the record will disclose the name of the mortgagee and the date of the record: *Johnson* v. *Zink*, 52 Barb.

EVIDENCE.

Lost Instrument—Time of Objection to Competency of Evidence.—When the only evidence of the loss or destruction of a written instrument is that of one witness, who testifies as follows: "The order is now so mislaid that I cannot find it:" *Held*, that all oral or other secondary evidence of its contents is incompetent and inadmissible: *Johnson & Sweeny* v. *Mathews*, 5 Kan.

The proper time to object to the introduction of testimony for incompetency is when such testimony is offered in evidence at the trial: *Id.*

A party who does not object, while a deposition is being taken, to the testimony of a witness, on the ground that it is or may be at the trial incompetent, does not thereby waive his right to make such objection at the trial: *Id.*

The plaintiffs in their petition alleged, "that the defendant contracted to transport a brick machine for them from Kansas City to Fort Scott without delay, which he neglected and refused to do," but they did not allege or attempt to prove on the trial that the defendant at the time of making the contract had any knowledge of what the plaintiffs wanted to do with the machine, or that they intended or expected to have any hired hands to run the machine. *Held*, that the court did not err in excluding all evidence tending to show that plaintiffs had a large number of hands in their employ who were idle on account of not getting the machine at the time it should have been delivered: *Id.*

EXECUTOR.

Suits against in New Hampshire.—If a suit be prematurely brought against an executor, upon a debt due by the deceased, under sec. 1, chap. 161, Rev. Stats., being within one year from the granting of administration, the executor must plead that fact in abatement and not in bar: *Amoskeag Manufacturing Co.* v. *Barnes*, 48 N. H.

But in a suit against such executor on such claim, the plaintiff must prove affirmatively, as a part of his case, even under the general issue pleaded, that his claim was presented to the executor within two years from the granting of administration according to the provision of sec. 2 of said chapter, and without such affirmative proof he cannot recover: *Id.*

When such suit is brought against such executor on such claim more than three years after the granting of administration, such executor (except in certain specified cases) must plead in bar the limitation contained in sec. 5 in said chapter: *Id.*

The executor is not at liberty in such case to omit to plead the limitation of that statute, as he may the general Statute of Limitations, in cases where the debt is otherwise just: *Id.*

Nor can the executor by any new promise or guaranty take said claim out from the operation of this provision of the statute, but the same will be barred after the expiration of said three years as against the estate, though said executor may make himself personally liable by such new promise: *Id.*

Foreclosure Sale.

Right of Purchaser to Rents.—A purchaser at a foreclosure sale is not entitled to the rents of the mortgaged premises which accrue between the sale and the delivery of the deed, where such purchaser does not complete his purchase at the time designated in the terms of sale: *Mitchell* v. *Bartlett*, 52 Barb.

Thus, where the purchaser refused to complete his purchase, and the premises were resold, and the second purchaser also refused, and the premises were resold a third time, and were bought by a person acting for the original purchaser, when the sale was completed by the latter under his first purchase: *Held*, that he was not entitled to the intermediate rents: *Id.*

In such a case the deed does not relate back to the day of sale, so as to entitle the purchaser to the rents accruing between the sale and the giving of the deed; where he has by his own act, and in violation of his contract, delayed the completion of the purchase: *Id.*

Frauds, Statute of.

Agreement not within.—Although hop-roots, when rooted in the ground, are a part of the real estate of the proprietor of the soil, and will pass to the purchaser by a conveyance of the land, and to the heir, by inheritance, yet where the plaintiff agreed by parol to deliver to the defendant a quantity of hop-roots, at a future time, at a specified price per bushel: *Held*, that this was not an agreement to sell or purchase an interest in real estate, but was an executory contract by the plaintiffs to purchase for, or to sell and deliver to, the defendant, an article of merchandise which, when delivered, would be personal property, and was, therefore, not within the Statute of Frauds requiring such agreement to be in writing: *Webster et al.* v. *Zielly*, 52 Barb.

Note or Memorandum.—The Statute of Frauds does not require the *note* or *memorandum* therein specified to be made and subscribed by the party to be charged at *the time* of making the agreement. It may be made at any time afterwards, and before the time for its consummation: *Id.*

A subsequent written recognition of a contract void by the Statute of Frauds is not only a ratification of it, but is a sufficient note or memorandum of the contract within the statute: *Id.*

Payment of part of Price.—The payment of a part of the purchase-money, on a contract for the sale of personal property exceeding $50 in value, need not be made at the time of making the original contract. If the payment be made subsequently by the one party and accepted by the other, as the consummation of the prior agreement, it brings the case within the spirit and intent of the Statute of Frauds, and will be considered paying a part of the purchase-money *at the time*: *Id.*

Fraudulent Conveyances.

Where a conveyance shows, on its face, that its object and effect was to prevent, at least temporarily, the enforcement by a creditor of his demands against the grantor, and to obstruct and hinder their collection, it is void and in violation of the statute prohibiting such convevances or

assignments of property; and upon no legal principle can it be upheld: *Sweet* v. *Tinslar*, 52 Barb.

The rule is well settled that where two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of such persons, as against the other, from the consequences of his misconduct: *Stewart et al.* v. *Ackley et al.*, 52 Barb.

GOLD COIN. See *Legal Tender Notes.*

INSURANCE.

Proximate Cause.—Cotton in a warehouse was insured against fire, the policy containing an exception against fire which might happen "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane." An explosion took place in another warehouse, situated directly across a street, which threw down the walls of the first warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, and among them the warehouse where the cotton was stored, which, with it, was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour. *Held*, that the insurers were not liable; the case being one for the application of the maxim, "*Causa proxima, non remota spectatur:*" *Insurance Co.* v. *Tweed*, 7 Wall.

INTERNATIONAL LAW.

Sale of Ship by Belligerent.—A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent: *The Georgia*, 7 Wall.

LANDLORD AND TENANT.

Rent reserved to be paid by Repairs.—By a lease, dated March 15th 1864, plaintiff leased a house of the defendant for the term of five years, "the said Smith yielding and paying therefor rent by" certain specified repairs on the house; "and the said lessee promises to pay the said rent in the repairs, work, materials, and additions, &c., as above set forth, all to be completed during the years A. D. 1864 and 1865;" "and that said lessors may enter to expel the lessee if he shall fail to pay the rent as aforesaid." Plaintiff did not make all the repairs before 1866, and in January 1866, the defendant expelled the plaintiff from the house.

In *assumpsit* for labor and materials by the plaintiff to recover for the repairs made by him in 1864 and 1865 upon the house: *Held*, that plaintiff would be entitled to recover, if the real value of his repairs

and additions to the house exceeded the fair value of his use and occupation of the premises down to the time when he was expelled, and also the damage suffered by the defendant from the breach or breaches of the contract by the plaintiff: *Smith* v. *Newcastle*, 48 N. H.

Also, *held*, that plaintiff could not maintain such suit until after the expiration of the five years embraced in the original contract: *Id.*

Right to Manure.—A tenant at will of buildings only, who occupies part of a barn to keep his cattle and feeds them from his own hay, which he removes from his own farm for that purpose, will be entitled to the manure thus made by his cattle, and may remove or sell the same while such tenancy continues or after it has expired: *Corey* v. *Bishop*, 48 N. H.

And if the lessor, during the continuance of such tenancy or after it has ceased, sell and convey the premises on which the manure is thus situated, to a third person, not reserving the manure, yet if the purchaser has knowledge of the facts relative to the manure, he cannot hold the same under his deed: *Id.*

Ejectment by Landlord—Covenant.—Where, under a clause of reentry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which state a judgment in ejectment has the same conclusiveness as common-law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease; nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid: *Sheets* v. *Selden*, 7 Wall.

Where, in a lease of a water-power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs to the water-channel made necessary by the landlord's gross negligence. He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied: *Id.*

In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due and the amount which he could rightly claim by way of reduction for failure of water: *Id.*

Legal Tender Notes

Not Taxable.—United States notes issued under the Loan and Currency Acts of 1862 and 1863, intended to circulate as money, and actually constituting, with the national bank notes, the ordinary circulating medium of the country, are obligations of the National Government, and exempt from state taxation: *Bank* v. *Supervisors*, 7 Wall.

United States notes are engagements to pay dollars; and the dollars intended are coined dollars of the United States: *Id.*

Contracts for Payment in Coin.—A contract to pay a certain sum in gold and silver coin is in substance and legal effect a contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count: *Butler* v. *Horwitz*, 7 Wall.

Whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States: *Id.*

There are, at this time, two descriptions of lawful money in use under Acts of Congress, in either of which (assuming these acts, in respect to legal tender, to be constitutional) damages for non-performance of contracts, whether made before or since the passage of these acts, may be assessed in the absence of any different understanding or agreement between the parties: *Id.*

When the intent of the parties as to the medium of payment is clearly expressed in a contract, damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent: *Id.*

When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed in coin, and judgment entered accordingly: *Id.*

Limitations, Statute of.

Complaint showing the Cause to be barred is insufficient.—A petition that shows upon its face that the cause of action is barred by the Statute of Limitations, does not state facts sufficient to constitute a cause of action: *Zane* v. *Zane*, 5 Kan.

A defendant in default, who has neither answered nor demurred, has not thereby waived his right to object to the sufficiency of such a petition: *Id.*

And in such a case it is error for the District Court to receive evidence, and render judgment on such a petition, over the objections of the defendant: *Id.*

Naturalization.

Foreign Woman.—The Act of Congress of February 10th 1855, wnich declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous Acts of Congress provide: *Kelly* v. *Owen et al.*, 7 Wall.

The terms "married," or "who shall be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers citizenship upon her: *Id.*

The object of the act was to allow the citizenship of the wife to follow that of her husband, without the necessity of any application for naturalization on her part: *Id.*

The terms "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women: *Id.*

New Trial.

Review in the Supreme Court.—The granting or refusing a new trial, for the reason that "the verdict is not sustained by sufficient evidence," must always, to a great extent, be left to the sound discretion of the court trying the cause; and the Supreme Court will not reverse an order of the District Court, setting aside the verdict of the jury and granting a new trial, unless a great preponderance of the evidence appears to sustain the verdict: *Anthony* v. *Eddy and Arnold*, 5 Kan.

Pilot Laws. See *Admiralty*.

Pleading.

Contract with Several Undertakings.—In declaring upon a special contract the entire consideration must be set forth, and must be proved as alleged: *Smith* v. *Webster*, 48 N. H.

Where a contract consists of several engagements or promises on the part of defendant, quite distinct and separate from each other, but founded on one and the same entire consideration, an action cannot be brought for the breach of any one of such engagements or promises, without setting forth in the declaration the entire consideration applicable to all the promises collectively: *Id.*

But the rule is different in stating the defendant's promise, for the plaintiff is only required to set forth with correctness that particular part of the contract which he alleges the defendant to have broken: *Id.*

Effect of Plea of Tender—Estoppel.—Where the cause of action in the declaration is single and indivisible, a plea of tender, or a confession, is an admission of the cause of action laid in the declaration: *Dow* v. *Epping*, 48 N. H.

But where the cause of action is divisible, as where there are several counts in the declaration, a plea of tender or a confession accompanied by the general issue, is held simply to admit some cause of action alleged, and that plaintiff is entitled to recover the amount tendered or confessed for such cause; but the tender or confession is no admission further than that: *Id.*

Defendant town elected no highway surveyors at its annual meeting, and the selectmen directed W. to act as a highway surveyor in his district, and he did so. They issued a warrant in common form, addressed to him as highway surveyor of said district, directing him to collect in labor the several taxes specified in his list, and defining the limits of his district, &c., which warrant he accepted and acted under through the year. And after he had caused all the taxes in said warrant to be expended in labor in said district, he purchased of D., for the town, a lot of stones to use in repairing a bridge in said district, and agreed upon the price of the same, as such surveyor, and the stones were taken and used accordingly. In a suit by D. to recover of the town the price of the stones, *Held*, that the town could not be heard to deny that W. was highway surveyor in said district, even though his appointment may not have been in writing, or his appointment and the certificate of his oath of office may not be recorded in the town records: *Id.*

The selectmen of a town, as its prudential officers, may appoint an agent to build or repair roads or bridges, in cases where by law it becomes their duty thus to build or repair as such selectmen: *Id.*

Practice.

Admission of Persons not Parties to defend or prosecute.—According to the practice in New Hampshire, any person who can satisfy the court that he has any rights involved in the trial of a cause, may be admitted to prosecute or defend the action: *Parsons* v. *Eureka Powder Works*, 48 N. H.

A person not the defendant in interest, but who has been admitted to defend an action, may properly be allowed, in the discretion of the court, to plead the Statute of Limitations: *Id.*

River.

Change of Channel.—When the channel of a river has been gradually changing for years, by wearing away the bank on the defendant's side, and by adding and forming accretions upon the opposite shore owned by plaintiff, by slow and imperceptible degrees, the channel as so changed must be regarded as the rightful and accustomed channel, for the time being, as between the different parties: *Gerrish* v. *Clough*, 48 N. H.

Such accretions become the property of the landowner upon that side of the river, and are as much entitled to protection as his original enclosure: *Id.*

In such case the defendant may protect his banks from further encroachment by rubbling or other means, provided it do not cause a change in the (then) accustomed channel of the river, to the material or appreciable injury of other riparian owners; but he has no right to build a dam, breakwater, or other obstruction in the stream, which will raise the water upon the plaintiff's land, or wash the same away: *Id.*

The questions in regard to the right of *a reasonable use* of the stream, or in regard to *ordinary care and prudence*, in erecting such dam or obstruction, do not arise in such case: *Id.*

Shipping. See *Admiralty.*

Supreme Court. See *Taxation.*

Jurisdiction. — This court cannot acquire jurisdiction of a cause through an order of a Circuit Court directing its transfer to this court, though such transfer be authorized by the express provision of an Act of Congress. Such provision must be regarded as an attempt, inadvertently made, to give to this court a jurisdiction withheld by the Constitution: *The Alicia*, 7 Wall.

In such a case, a notice to docket and dismiss must be denied, and this court will certify its opinion to the Circuit Court, for information, in order that it may proceed with the trial of the cause: *Id.*

Taxation. See *Legal Tender Notes.*

Certificates of Indebtedness.—Where an act of a state legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on Federal securities made by the Constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the bank claimed reimbursement was, in law, not exempt, and the highest court of the state sanctioned this refusal: *Held*, that

this was a decision by a state court against a right, privilege, or immunity claimed under the Constitution or a statute of the United States, and so that this court had jurisdiction under the 25th section of the Judiciary Act, and the amendatory Act of February 5th 1867: *The Banks* v. *The Mayor*, 7 Wall.

Certificates of indebtedness issued by the United States to creditors of the government, for supplies furnished to it in carrying on the recent war for the integrity of the Union, and by which the government promised to pay the sums of money specified in them, with interest, at a time named, are beyond the taxing power of the States: *Id.*

Trespass.

Injury to Trespasser—Fence Laws.—Every owner of property, before he can maintain an action to recover for injuries to it must show that he used reasonable and ordinary care and diligence, to protect it from injury: *Calkins* v. *Mathews*, 5 Kan.

While the legislature of this state, by enacting certain fence laws, and laws regulating the running at large of stock, have impliedly declared that such reasonable care and diligence with regard to real estate, shall be to fence it with a lawful fence, and that no action shall lie for injuries done by roaming cattle, unless such lawful fence is made; yet they have nowhere attempted to enact any law, giving to any person any right upon another's land, whether fenced or not; an act of that kind would tend to disturb vested rights, and be unconstitutional and void: *Id.*

It is not necessary, in order to enable a party to recover for injuries to his property, caused by the negligence of others, that he should be entirely free from all negligence himself; but if his negligence is slight, and that of the other party is gross, or if his is remote, and that of the other is the proximate cause of the injury, he may recover: *Id.*

It is a question of fact for the jury to determine, whether there has been negligence and its nature and degree, but it is a question of law, for the court to determine, what degree of care and diligence on the one side, and of negligence on the other, will entitle the plaintiff to recover: *Id.*

The plaintiff below allowed his horse to run at large. The horse wandered on to the unenclosed land of the defendant, and fell into an old well, which caused his death: *Held*, That the plaintiff cannot recover, unless the defendant was guilty of *gross* negligence in leaving the old well open: *Id.*

It was error for the court to charge the jury in such a case, that the defendant is liable, if through his failure to exercise *ordinary* care and prudence in the management of his land the horse was killed: *Id*

Title of Plaintiff.—In an action for cutting down and carrying away timber, from a certain piece of land in the possession of the plaintiff below, who claims to be the owner thereof, and whose evidence of title is, 1st. A patent from the United States to an incompetent Wyandotte Indian, issued under article 4 of the treaty with the Wyandottes, of January 31st 1855; and 2d. A deed, not approved by the Secretary of the Interior, from said Wyandotte Indian to himself: *Held*, That the plaintiff may maintain the action. That although his title may be defective, yet while he is in possession, claiming to be the owner, and has color of title, no mere wrongdoer can dispute his title: *Nelson* v. *Mather*, 5 Kan.